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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

Judith Clinton, PETITIONER

vs.

Middlesex Mutual Assurance Company, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE CONNECTICUT APPELLATE COURT

PETITION FOR WRIT OF CERTIORARI

Judith Clinton
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39 pp

QUESTION PRESENTED

May a court order a unilateral appraisal of the fire damage to an insured's home, against the wishes of the insured, without violating the insured's Constitutional rights under the 4th Amendment, which provides for protection against illegal search and seizure, or the 14th Amendment, which guarantees the insured the right to due process, when the insured has alleged fraud, duress, misrepresentation and bad faith against the insurer regarding the claims handling procedures of the insurer?

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NO._____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 1995

Judith Clinton, Petitioner

vs.

Middlesex Mutual Assurance Company, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CONNECTICUT APPELLATE COURT

Petitioner, Judith Clinton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Connecticut Appellate Court, affirming the order of the trial Court, J. D. of Middlesex, Middletown, Connecticut, ordering the petitioner to proceed to appraisal pursuant to a clause in a fire insurance policy, despite the protests of petitioner that said insurance company has acted in bad faith. Said order of the court circumvents petitioner's right to due process under the 14th Amendment of the United States' Constitution, in that it interferes with the petitioner's right to proceed with litigation. Said order seeks to compel a forced arbitration on petitioner's property without the permission of the petitioner, which would harm the petitioner's right to privacy as guaranteed under the 4th Amendment of the Constitution. Moreover, the Decision of the Connecticut Appellate Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's supervisory power.

OPINIONS BELOW

The opinion of the Connecticut Appellate Court is reported as Middlesex Mutual Assurance Company v. Edward Clinton et al, 38, Conn., App. 555, and appears in Appendix A.

JURISDICTION

The opinion of the State of Connecticut Appellate Court was published on August 1, 1995. A timely motion for reargument was filed on August 8, 1995. The Appellate Court denied the Motion For Reargument on September 7, 1995. In accordance with the Rules of the Appellate Court of the State of Connecticut, a Petition for Certification To Appeal was filed with the Supreme Court of the State of Connecticut on September 25, 1995, and said Certification was denied on October 27, 1995. The denial of the Petition For Certification To Appeal is set forth in Appendix B. This Court's jurisdiction is invoked under Title 28, U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth and Fourteenth Amendments to the United States Constitution are set forth in Appendix C.

STATEMENT OF THE CASE

This is an action which has grown out of a contract of insurance for loss by fire under a homeowners policy, which the petitioner (Judith Clinton) has with the plaintiff (Middlesex Mutual Assurance Company). The loss by fire occurred on April 21, 1993. On February 24, 1994, ten months after the loss, the defendant was served with an "Application For Order To Proceed With Appraisal and For Appointment of Appraiser," brought by the plaintiff, pursuant to Connecticut General Statute **52-410** and **52-411**, asking that the Court compel the defendant to appoint an appraiser and to proceed with appraisal under the appraisal provision of the insurance

policy and by authority of the above mentioned statutes. The defendant replied in an Answer and asserted that the offer set forth by the insurance company was fraudulent and that the insurance company had acted in bad faith, thereby, waiving its right to assert the appraisal provision of the insurance contract.

On March 7, 1994, there was a Show Cause Hearing at the Middlesex Superior Court in Middletown, Connecticut, before the Honorable Bernard Gaffney. And on March 8, 1994, one day later, the Court granted the plaintiff's "Application," ordering the defendant to proceed to appraisal/arbitration. The Order was entered in spite of the fact that the defendant had timely filed a Motion To Dismiss to the plaintiff's Application, which was never addressed, or ruled upon, by the Court.

The defendant, Judith Clinton, appeared pro se at the Show Cause Hearing on March 7, 1994, and challenged the Court's jurisdiction citing some twelve jurisdictional defects in the plaintiff's "Application," which included the fact that both defendants named in the "Application" had not been personally served. The Court, acknowledged the Motion To Dismiss, heard the oral argument on the Motion To Dismiss, and then failed to rule on the Motion To Dismiss.

Further, the Court ordered the defendant to proceed to appraisal/arbitration without considering "the rights of the parties," in accordance with the statute cited by the plaintiff, most notably the length of time before which the appraisal demand was made by plaintiff, and the Court, further, failed to give any consideration to defendant's allegations of fraud and duress against the insurance company.

The Court made an order for the defendant to proceed with appraisal/arbitration in a fire insurance policy claim, based on **CGS 52-410** and **52-411,** when said statutes cites statutory relief for "an aggrieved insured" only. (*emphasis added*)

The Court ordered the defendant to proceed to appraisal/ arbitration without any evidence of a contract to appraise/ arbitrate (a requirement of **CGS 52-410**)having been entered

into evidence, and, further, without any evidence of a dispute having ever been entered by the plaintiff, as required by statute.

These issues were all briefed on appeal by the defendant, Judith Clinton, and the plaintiff filed a brief in opposition to defendant's brief.

On March 21, 1995, oral argument was heard by the Connecticut Appellate Court, and its decision affirming the trial court's order was published on August 1, 1995.

REASONS FOR GRANTING THE WRIT

The Decision of the Connecticut Appellate Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's supervisory power.

In rendering its decision, the Appellate Court did not consider the following:

1. The Decision improperly and unlawfully changes the finding of the Connecticut Supreme Court in Covenant v. Banks, 177, Conn. 273, 279, 413 A 2s. 862 (1979), one of only two cases in the United States regarding compelled appraisal in an insurance claim. To find, as the Appellate Court has in this case, that Covenant v. Banks applies to a "recalcitrant insured," creates new law, ignores the specific language and intent of Covenant v. Banks, alters the purpose of Banks, and, unconstitutionally, affects an insured's right to bring suit for fraud. Further, this ruling essentially allows the state to order an unwarranted search of an insured's property in violation of the 4th Amendment of the Constitution of the United States.

2. By its failure to address the defendant's assertion of lack of jurisdiction, because the lower court did not rule on her Motion To Dismiss, the Appellate Court implicitly ruled that a court does NOT have to assert jurisdiction, once that jurisdiction is challenged, which would allow a court to proceed without jurisdiction, violating the defendant's Constitutional right to due process under the Constitution of the State of Connecticut and the 14th Amendment of the United States Constitution as well.

3. Owing to the failure of the Appellate Court to address the defendant's claim of abatement for lack of service on a co-defendant, the Appellate Court has ruled that lack of service on a co-defendant is NO LONGER grounds for abatement. This creates new law and abridges the Constitutional rights of the defendant.

4. By allowing a Return Date to be changed without motion, the Appellate Court made new law. Further, by allowing the Return Date to be changed to one day AFTER the Hearing, the Appellate Court robbed the defendant of her right to due process, and set a dangerous precedent.

5. By affirming a lower court decision, made without any evidence having even been attempted to be presented by plaintiff, and none allowed to be presented by the defendant, and by finding that it was the obligation of the defendant to prove a contract of insurance did NOT exist, the Appellate Court ignored existing law, created new law, and improperly placed the burden of proof on the defendant, asking that the defendant prove a negative.

6. The Appellate Court affirmed the lower court's finding with no evidence having been produced by the plaintiff, which is in clear violation of State v. Carey, 30, Conn. App. 346, 351, a 2d 201 (1993), which states: " an appellant is entitled to review of claims on appeal only on the basis that the evidence was admitted in the trial court." Under the Statutes of the State of Connecticut, we find "To obtain an order to compel arbitration under insurance policy provisions, plaintiff must first establish policy coverage."(*emphasis added*) 155C. 271. For the Appellate Court to find that the defendant had an obligation to prove that there was no policy, contradicts the above-mentioned statute, and is, therefore, an improper finding. Further, when the Appellate Court found that the plaintiff was not obligated to include a copy of the agreement to arbitrate with service of its Appplication, the Court allowed a violation of **CGS 52-410 & 52-411**. Consequently, this Appellate Decision has effectively and improperly rewritten both statutes. **52-410** allows that the form of the complaint "may" comply with the form set forth in the statute.

However, **CGS 52-410** requires inclusion of the agreement to arbitrate. And this position is repeated in **52-411**, which states, "An application under this section and the proceedings thereon shall conform to the application and proceedings provided for in **52-410**, except that such changes shall be made in the complaint as may be necessary to correctly and concisely state the plaintiff's claim." To establish a right to have an Arbitration Hearing, the plaintiff must first set forth the agreement to arbitrate in its Application. Plaintiff did NOT do this. Nor did plaintiff set forth the agreement to arbitrate at the Hearing. Yet plaintiff still prevailed at both the Superior and Appellate Court levels. Furthermore, for the Appellate Court to ignore the fact that the plaintiff briefed a different set of issues and facts, contradicts the above-mentioned caselaw is a clear violation of Connecticut Practice Book Rule # 4013.

7. Moreover, to allow a Return Date to be changed to one day AFTER the Hearing is a violation of the defendant's right to due process, and is an egregious change in the laws of the State of Connecticut regarding due process as it pertains to hearings and notification regarding hearings.

8. The Appellate Court failed to rule on the lower court's failure to rule on the defendant's Motion To Dismiss, which is also an abridgement of the defendant's right to due process. Gimbel v. Gimbel, 147, Conn., 561. (1960) states "...when absence of jurisdiction is brought to the attention of the court, cognizance of the fact must be taken and the matter determined before it can move further in the case." At the Superior Court level, the Court's jurisdiction was challenged by defendant's Motion To Dismiss. The Superior Court failed to rule on this motion and proceeded to issue its Order anyway. By affirming the lower court's decision, the Connecticut Appellate Court further precluded the defendant from a fair hearing in violation of the Constitution of the State of Connecticut, which clearly states; "all Courts shall be open and every person for an injury done to him in his person, property or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Constitution of the State of Connecticut, Article 1 para 10. Similarly, the Connecticut Appellate Court's well established policy of disallowing pro se litigants from having pre-trial conference, while giving this same right to all professional litigants, abridges a pro se litigant's right to due process, as does the Court's policy of not questioning the pro se during Oral Argument, while allowing professional attorneys to answer questions put forth from the bench so as to further explain their position to the Court.

This stated policy of the Connecticut Appellate Court of not questioning pro se litigants at oral argument, while in the same Hearing questioning opposing attorney-litigants in depth, allows an attorney-litigant to explain his position more fully, and to enjoy the benefit of a give-and-take discussion of the issues, a benefit which the Connecticut Appellate Court has a policy of never extending to pro se litigants. This policy gives unfair advantage to attorneys opposing pro se litigants, resulting in a violation of a pro se's Constitutional guarantee of equal justice. This is a gross disadvantage for every pro se litigant appearing before the Connecticut Appellate Court.

9. The Appellate Court's "broad" view of Covenant v. Banks, 177 Conn. 273, 275-281 (1979), as expressed in its 8/1/95 Decision, allows an insurance company to compel unilateral arbitration, and ignores the essence of the Connecticut Supreme Court Decision in Banks, which is that the insurance company has superior bargaining power, and because of this, the insured needs a device to compel an insurance company to come to the table. Banks does not provide an insurance company the right to prevent litigation for fraud by compelling binding arbitration, as the insurance company has sought to do in this case.

The Connecticut Supreme Court Decision in Banks, specifically and solely, cites relief for "an aggrieved insured." The language is clear, unambiguous, and purposely limited. To attempt to substitute language regarding "a recalcitrant insured" is absurd. This Appellate finding makes no sense, and

has no basis in the law, but it will have a grave effect on every insured in the State of Connecticut and in the United States as a whole.

Insureds can proceed with unilateral appraisal because they own the property in question. Insurance companies cannot so proceed, against the will of the insured, because insurance companies would need to obtain warrants to enter the insured's property, and, if issued, these orders would have the effect of a 17th Centruy Writ of Assistance and would constitute a violation of the insured's 4th Amendment rights against unlawful search. Therefore, the Appellate Court's finding in this matter is either unenforceable, or unconsitutional, or both.

Lastly, the Appellate Court ignores the fact that the appraisal clause in an insurance policy only becomes binding arbitration when two appraisers have proceeded with an appriasal, come to a disagreement, and then decide to appoint an umpire to resolve that disagreement. Prior to this point, they are merely engaging in an appraisal. To find outherwise, would allow an insurance company to engage in fraud in the appraisal process and then to escape liability through compelled binding arbitration, which is the situation in this case. To change Banks to the extent of the August 1, 1995 Connecticut Appellate Court Decision in this matter is a violation of this defendant's right to due process, and is error with national implications.

10. Finally, for the Appellate Court to simply ignore the defendant's claim of abatement owing to lack of service on a co-defendant was error. The caselaw cited by the Appellate Court had to do with late service, not lack of service. Defendant asserted abatement owing to lack of service on a co-defendant in accord with **CGS 52-123** and Draper v. Moriarity, 45, Conn. 477 (1878), which states: "The writ in this case being clearly abatable, it was competent and proper for the defendant upon whom service was made to plead that no service was made on his co-defendant."

11. The Appellate Court erred by failing even to consider the cumulative effect of the 12 jurisdictional errors, an issue that had been briefed by the defendant and waived by the plaintiff.

The Connecticut Appellate Court did not consider the defendant's argument, set forth in her Reply Brief, that the plaintiff, in its brief, had improperly briefed a different set of facts and issues. The Appellate Court should have refused to consider the plaintiff's brief because of this egregious breach of Practice Book Rules. If the Appellate Court considers the different facts and issues briefed by the plaintiff, as it has done, then it must consider the defendant's Reply to the plaintiff's brief, which the Appellate Court did not do. The failure of the Appellate Court to consider this argument deprives the defendant of a fair hearing.

Moreover, the Appellate Court's Decision states that owing to **CGS 52-408** an arbitration agreement can be declared void for fraud, duress..."among other reasons not pertinent here." The Decision does not, however, state why **CGS 52-408** is "not pertinent here." In fact, **CGS 52-408** is very pertinent here, because it states, in a portion not quoted by the Appellate Court Decision, that "A contract claimed invalid by virtue of fraud, duress, misrepresentation, undue influence or other grounds may be assailed at any time before judgment and award." Defendant did not have to prove fraud or duress. Defendant only had to claim invalidity by virtue of fraud and duress, which defendant did. Defendant has alleged fraud and duress repeatedly throughout all the proceedings, both at the Superior Court and at the Appellate Court. For the Appellate Court to find that the defendant has "inadequately briefed" the issue of fraud is error, especially in light of the Appellate Court's partial assertion of **CGS 52-408**, wherein the Court clearly misstates the actual language of **CGS 52-408** and then leaves out the section of **CGS 52-408** which applies in this instance.

The Appellate Court failed to consider the defendant's argument that the cumulative effect of the many and varied

jurisdictional defects was fatal, even if the several effect was not. This argument asserted by defendant was never briefed or even addressed by plaintiff. For the Appellate Court to consider the jurisdictional defects seriatim, and only seriatim, without considering the cumulative effect of the many jurisdictional defects, an issue which had been briefed by the defendant and not by the plaintiff, deprives the defendant of a fair Hearing.

For the Appellate Court to rule that the defendant had an obligation to prove there was not a contract, that there was not a dispute etc. etc., requires that the defendant must prove a negative. **CGS 52-410** states that the parties "shall be considered as at issue on the allegations of the complaint unless the defendant files an answer thereto..." Defendant DID file an Answer, which is part of the record, so the burden of proof as to what was at issue returned to the plaintiff. And since the plaintiff entered no evidence in support of any part of its position, including having failed to ever introduce a copy of an agreement to arbitrate, the Superior Court and the Connecticut Appellate Court both should have ruled in favor of the defendant. To do otherwise, violates the defendant's state and federal Constitutional rights as asserted by defendant.

Under the equal protection clause, any classification which serves to penalize the excercise of a constitutional right, unless shown to be necessary to promote a compelling government interest, is unconstitutional. San Antonio Independent School Dist. v. Rodriguez, 411 US 1, 93 S Ct 1278. To show a denial of equal protection; it is the circumstances of each case which govern. Griffin v. County School Board of Prince Edward County, 377 US 218, 84 S ct 1226. Actual conditions cannot be ignored, and the court ought not, through assumptions out of harmony with patent facts and overnice refinements, to facilitate the practical destruction of admitted legal obligations. Hendrickson v. Apperson, 245 US 105, 38 S Ct 44. And that is exactly what has happened in this instance; both courts in Connecticut, "the insurance state," have ruled in favor of an insurance company without any legal basis or any logical rationale apparant on the face of things.

The due process and the equal protection clauses of the Federal Constitution each trigger a distinct inquiry: due process emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated: Evitts v. Lucey, 469 US 387, 105 S Ct 830.

The case of Hardware Dealers Mut. F. Ins. Co. v. Glidden Co. 284 US 151, 52, S Ct. 69, addresses the issue of the appraisal provision in a fire insurance policy and its operation on the right of due process, but it most clearly and specifically expresses the same remedy as provided for in **CGS 52-408,** that being that arbitration clauses in fire insurance policies procured by fraud, infringe the due process clause of the 14th Amendment.

CONCLUSION

The plaintiff never entered any evidence at the Superior Court Hearing, asserted no authority to have the Hearing, and yet plaintiff prevailed in a matter concerning defendant's home and property.

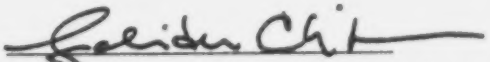
Defendant, on the other hand, was specifically disallowed from entering any evidence, and although defendant made a Motion To Dismiss, attacking the jurisdiction of the court, the Court failed to rule on this Motion and proceeded without authority to grant the Application sought by the plaintiff. This finding of the Superior Court was upheld by the Connecticut Appellate Court. The Connecticut Appellate Court Decision egregiously departs from the accepted and usual course of judicial proceedings and calls for exercise of the United States Supreme Court's supervisory power.

Furthermore, the United States Supreme Court should grant certiorari here to explicitly rule that the Decisions of the Connecticut Appellate Court and the Superior Court, J.D. Middlesex were made in violation of the petitioner's rights under the 4th and 14th Amendments to the United States Constitution.

For the reasons set forth in this petition, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Appellate Court in this matter.

DATED: January 25, 1996

Respectfully submitted,



Judith Clinton, Petitioner, Pro Se

No._____

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

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Judith Clinton, PETITIONER

vs.

Middlesex Mutual Assurance Company, RESPONDENT

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PETITION FOR WRIT OF CERTIORARI TO THE
CONNECTICUT APPELLATE COURT

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PETITION FOR WRIT OF CERTIORARI

APPENDIX

_____

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APPENDIX A

MIDDLESEX MUTUAL ASSURANCE COMPANY *v.* EDWARD CLINTON ET AL. (13428)

LANDAU, SCHALLER and SPEAR, Js.

The defendant C, whose home had been damaged by fire, appealed to this court from the judgment of the trial court ordering her to proceed with an appraisal in accordance with the terms of the homeowner's insurance policy issued by the plaintiff insurer. *Held:*

1. C could not prevail on her claim that the trial court lacked jurisdiction to order the appraisal; the plaintiff's use of an incorrect form to commence the proceedings did not prejudice the defendant, the sheriff's alteration of the return date before service was properly authorized by the plaintiff's attorney, the unnecessary inclusion of a recognizance in the application did not undermine jurisdiction, the failure to attach a copy of the arbitration agreement to the application did not violate the statute (§ 52-410 [b]) which provides the form that the application "may be in," the appraisal clause in C's policy granted the court the authority to order C to proceed with arbitration and the plaintiff's failure to achieve personal service on all defendants did not deprive the trial court of jurisdiction to consider the case on its merits as to C, who had been personally served.

2. The trial court properly granted the plaintiff's application to compel an appraisal; C did not have a right to have the court not appoint an appraiser, she did not have the right to have the agreement declared void for duress, she did not have the right to waive an appraisal and the statutory (§§ 52-410 and 52-411) procedures to compel an appraisal are available to both the insurer and the insured.
3. The trial court's determination that a dispute existed as to the amount of the loss was not clearly erroneous.

Argued March 21—decision released August 1, 1995

Application for an order to compel the defendants to proceed with an appraisal pursuant to a homeowner's policy of insurance issued by the plaintiff, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Gaffney, J.*, granted the application and rendered judgment ordering the defendants to proceed with an appraisal, from which the defendant Judith Clinton appealed to this court. *Affirmed.*

Judith Clinton, pro se, the appellant (defendant Judith Clinton).

Joel J. Rottner, with whom was *Barbara Sacks*, for the appellee (plaintiff).

LANDAU, J. The defendant Judith Clinton appeals from the judgment of the trial court ordering her to proceed with an appraisal.[1] She claims that the trial court (1) did not have jurisdiction to consider the plaintiff's application to compel the appraisal and (2) improperly granted the application to compel the appraisal because (a) the court failed to consider the rights of the parties, (b) General Statutes §§ 52-410 and 52-411 provide statutory relief only for an aggrieved insured, not an insurer, and (c) the plaintiff presented no evidence of an appraisal agreement or of a dispute as to the value of the loss.

[1] While Edward Clinton and Judith Clinton were the two defendants in the underlying action, only Judith Clinton, hereinafter the defendant, has appealed.

The following facts are relevant to our consideration of the defendant's claims. On April 21, 1993, Edward Clinton and Judith Clinton suffered a loss by fire at premises owned by them and insured by the plaintiff under a homeowner's policy. After the parties were unable to agree as to the value of the loss, the plaintiff appointed an appraiser pursuant to an appraisal clause in the insurance policy.[2] After the Clintons failed to appoint an appraiser, they were served with an application for an order to proceed with an appraisal and for the appointment of an appraiser pursuant to §§ 52-410 and 52-411.[3] The trial court conducted a hear-

[2] The appraisal clause provided: "If [the insured] and [the insurer] fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, [the insured] or [the insurer] may request that the choice be made by a judge of a court of record in the state where the residence premises is located. The appraisers will separately set the amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss."

Our Supreme Court has held that such a clause, which is required by the standard form of fire insurance policy set forth in General Statutes § 38a-307, constitutes an agreement to arbitrate and falls within the ambit of our arbitration statutes, General Statutes §§ 52-408–52-424. *Giulietti* v. *Connecticut Ins. Placement Facility*, 205 Conn. 424, 432, 534 A.2d 213 (1987); *Covenant Ins. Co.* v. *Banks*, 177 Conn. 273, 279, 413 A.2d 862 (1979).

[3] General Statutes § 52-410 provides: "APPLICATION FOR COURT ORDER TO PROCEED WITH ARBITRATION. (a) A party to a written agreement for arbitration claiming the neglect or refusal of another to proceed with an arbitration thereunder may make application to the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, to any judge thereof, for an order directing the parties to proceed with the arbitration in compliance with their agreement. The application shall be by writ of summons and complaint, served in the manner provided by law.

"(b) The complaint may be in the following form: '1. On , 19 , the plaintiff and the defendant entered into a written agreement for arbitration, of which exhibit A, hereto attached, is a copy. 2. The defendant has neglected and refused to perform the agreement for arbitration, although the plaintiff is ready and willing to perform the agreement. The

ing on the plaintiff's application and, on March 8, 1994, granted the application and ordered the Clintons to proceed to appraisal.[4] This appeal by the defendant followed.

plaintiff claims an order directing the defendant to proceed with an arbitration in compliance therewith.'

"(c) The parties shall be considered as at issue on the allegations of the complaint unless the defendant files answer thereto within five days from the return day, and the court or judge shall hear the matter either at a short calendar session, or as a privileged case, or otherwise, in order to dispose of the case with the least possible delay, and shall either grant the order or deny the application, according to the rights of the parties."

General Statutes § 52-411 provides: "APPOINTMENT OF ARBITRATOR OR UMPIRE. (a) If, in a written agreement to arbitrate, a method of appointing an arbitrator or arbitrators or an umpire has been provided, the method shall be followed.

"(b) If no method is provided therein, or if a method is provided and any party thereto fails to use the method, or if for any other reason there is a failure in the naming of an arbitrator or arbitrators or an umpire, or if any arbitrator or umpire dies or is unable or refuses to serve, upon application by a party to the arbitration agreement, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall appoint an arbitrator or arbitrators or an umpire, as the case may require. A person so appointed an arbitrator or umpire shall act under any arbitration agreement with the same force and effect as if he had been specifically named or referred to therein. Unless otherwise provided in the agreement, the arbitration shall be by a single arbitrator.

"(c) An application under this section and the proceedings thereon shall conform to the application and proceedings provided for in section 52-410, except that such changes shall be made in the complaint as may be necessary to correctly and concisely state the plaintiff's claim."

[4] In addition to ordering the Clintons to proceed to appraisal, the trial court ordered (1) that the Clintons would have until March 18, 1994, to designate an appraiser, (2) that the Clintons' appraiser and the plaintiff's appraiser would have until March 28, 1994, to appoint an umpire and (3) that if the Clintons failed to appoint an appraiser or the parties failed to agree on an umpire, the court would appoint an umpire.

We note that "[a]n order directing the parties to proceed with arbitration is a final judgment from which one can appeal. . . ." (Citations omitted; internal quotation marks omitted.) *Smith & Smith Building Corp.* v. *DeLuca*, 36 Conn. App. 339, 341, 654 A.2d 368 (1995). Thus, we have the requisite jurisdiction for appellate review.

I

The defendant first challenges the trial court's authority to have heard the plaintiff's application to compel appraisal. Specifically, she argues that the court lacked jurisdiction because (1) the plaintiff filed its application on Form JD-CV-1, which Practice Book § 49 excludes from use in matters pertaining to arbitration, (2) the plaintiff failed to make a proper appearance, (3) the plaintiff changed the return date on the original writ from March 1, 1994, to March 8, 1994, before the writ was served on the defendant, (4) the plaintiff included a recognizance in its application, (5) the plaintiff failed to attach a copy of the arbitration agreement to its application as an exhibit, (6) a contract of appraisal does not grant the trial court power to appoint an arbitrator or to order arbitration and (7) the plaintiff failed to achieve personal service on all defendants. We will consider the defendant's arguments seriatim.

A

The defendant first argues that the trial court lacked jurisdiction because the plaintiff filed its application to compel appraisal on Form JD-CV-1. She asserts that Practice Book § 49, which outlines the requirements for mesne process, provides that "Form JD-CV-1 shall not be used in . . . [p]roceedings pertaining to arbitration."

A defect in process, such as an improperly executed writ, implicates personal jurisdiction, rather than subject matter jurisdiction. *Brunswick* v. *Inland Wetlands Commission*, 222 Conn. 541, 551, 610 A.2d 1260 (1992). Our Supreme Court has held, however, in the context of an administrative appeal, that the improper use of Form JD-CV-1 does not defeat the Superior Court's jurisdiction "[a]s long as it contains a proper citation, signed by a competent authority . . . ." *Chestnut*

Realty, Inc. v. *Commission on Human Rights & Opportunities*, 201 Conn. 350, 356, 514 A.2d 749 (1986). In *Chestnut Realty*, "the court examined the contents of the form and, finding that the information adequately gave notice to the defendant of the nature of the proceedings, it concluded that, absent a showing of prejudice by the defendant, the use of the incorrect form did not mandate dismissal of the administrative appeal." *Carlson* v. *Fisher*, 18 Conn. App. 488, 493, 558 A.2d 1029 (1989).

We conclude that the same reasoning is applicable in the context of this case. " 'It is elementary that the [defendant] cannot be bound by the action of the court without reasonable notice and an opportunity to be heard.' " *Middlesex Ins. Co.* v. *Castellano*, 225 Conn. 339, 344, 623 A.2d 55 (1993). In this case, the defendant, while served with the incorrect form, nonetheless received actual notice of the proceedings. She was personally served on February 24, 1994, with the Form JD-CV-1 writ, the plaintiff's application to compel appraisal and an order to appear on March 7, 1994, and show cause why the application should not be granted. On the following day, February 25, 1994, the defendant filed an appearance, an answer and a motion to dismiss the defendant's application. Also, the defendant personally appeared at the March 7 show cause hearing. Thus, because the contents of the form adequately gave notice to the defendant of the nature of the proceedings and because the defendant has not shown prejudice arising from the use of the incorrect form, we must conclude that the plaintiff's lack of compliance with Practice Book § 49 was not fatal to the trial court's jurisdiction.

B

Our conclusion that the plaintiff's use of Form JD-CV-1 in this matter was harmless dictates that the

defendant's next argument must fail. She asserts that the plaintiff failed to make a proper appearance because its appearance was made by virtue of the Form JD-CV-1 writ, which may not be used in matters pertaining to arbitration. Because its underlying premise is not supportable, this claim is without merit.

C

The defendant next argues that the plaintiff's alteration of the return date deprived the trial court of jurisdiction. The application to compel appraisal was originally made returnable to the court on March 1, 1994. On February 24, 1994, the serving sheriff contacted counsel for the plaintiff and reported that he had been unable to locate the defendant until that day. Counsel for the plaintiff authorized the sheriff to alter the return date from March 1 to March 8, 1994, before serving the defendant.[5]

The defendant relies on *Denison* v. *Crafts*, 74 Conn. 38, 49 A. 351 (1901), for the proposition that a plaintiff cannot lawfully change the return date in his writ after its issue and before service, unless the writ is reissued at the time of the alteration. The defendant's reliance on this case, however, is misplaced. In *Denison*, the court held that a pro se plaintiff did not have the authority to alter process. *Denison* has since been cited for the proposition that only the issuing authority can change the return date of a writ. 1 E. Stephenson, Connecticut Civil Procedure (2d Ed. 1982) § 21b. In the case at hand, the alteration of the return date was made with the express authorization of the plaintiff's counsel, a commissioner of the Superior Court duly authorized to issue writs.[6] For this reason, we conclude that the alter-

[5] The plaintiff alleges in its appellate brief that the reason for the alteration was to provide the defendant with a sufficient amount of time between service and the return date.

[6] General Statutes § 52-45a provides in pertinent part: "COMMENCEMENT OF CIVIL ACTIONS. CONTENTS AND SIGNATURE OF PROCESS. Civil actions

ation of the return date is not, as the defendant claims, a jurisdictional defect.

In a subsidiary argument, the defendant asserts that the March 1, 1994 return date, which was subsequently altered, did not give her enough time to respond under the applicable accelerated pleading schedule of General Statutes § 52-410 (c), which provides that "[t]he parties shall be considered as at issue on the allegations of the complaint unless the defendant files answer thereto within five days from the return day . . . ."[7] Because the alteration was effective, however, the return date was March 8, 1994. The defendant was served on February 24, 1994, giving her a legally sufficient eight days within which to file an answer.

D

The defendant also contends that the trial court's jurisdiction was affected by the plaintiff's inclusion of a recognizance in its application to compel appraisal. She argues that the provision of a recognizance was improper because a recognizance is not required in arbitration proceedings. *Fishman* v. *Middlesex Mutual Assurance Co.*, 4 Conn. App. 339, 345–46, 494 A.2d 606, cert. denied, 197 Conn. 806, 499 A.2d 57 (1985) (plaintiff's application to compel arbitration pursuant to § 52-410 not subject to dismissal on basis of lack of recognizance). The court in *Fishman* noted that arbitration proceedings are " 'intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation.' *In re Curtis-Castle Arbitration*, 64

shall be commenced by legal process consisting of a writ of summons . . . . The writ . . . shall be signed by a commissioner of the superior court . . . ."

General Statutes § 51-85 provides in pertinent part: "Each attorney-at-law admitted to practice within the state, while in good standing, shall be a commissioner of the superior court and, in such capacity, may, within the state, sign writs . . . ."

[7] See footnote 3.

Conn. 501, 511, 30 A. 769 (1894) . . . ." (Citations omitted.) Id., 345. "To the extent that arbitration proceedings are viewed as requiring all the formal trappings of civil actions, those policies would be frustrated." Id. Just as the *Fishman* court determined that the omission of a recognizance did not defeat the trial court's jurisdiction to hear an application to compel arbitration, we conclude that the inclusion of the same, albeit an unnecessary "formal trapping of civil actions," likewise does not undermine the court's jurisdiction.

E

The defendant next argues that the plaintiff's application to compel appraisal was defective because the plaintiff failed to attach a copy of the arbitration agreement, as required by § 52-410. The plaintiff admits that it did not attach a copy of the arbitration agreement to its application, but asserts that § 52-410 permits but does not require such an attachment.

"In order to resolve the issue presented to us, we must resort to statutory interpretation in accordance with well defined principles that require that we ascertain and give effect to the apparent intent of the legislature. . . . To determine the intent of the legislature, we first consider whether the statutory language yields a plain and unambiguous resolution. . . . If the words are clear and unambiguous, it is assumed that [they] express the intention of the legislature . . . and we need inquire no further. . . . The words of a statute must be interpreted according to their ordinary meaning unless their context dictates otherwise. . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Burns*, 38 Conn. App. 8, 12, 658 A.2d 163 (1995).

Section 52-410 (b) provides in part that an application to compel arbitration "*may be* in the following form: '1. On , 19 , the plaintiff and the

defendant entered into a written agreement for arbitration, of which exhibit A, hereto attached, is a copy. . . .' "[8] (Emphasis added.) We must conclude, therefore, that the statute is permissive rather than mandatory regarding the attachment of a copy of the arbitration agreement. Thus, while the attachment of an arbitration agreement pursuant to a § 52-410 application is desirable and encouraged, the plaintiff's failure to do so was not a statutory violation and did not affect the jurisdiction of the trial court to hear the matter.

F

The defendant next challenges the trial court's jurisdiction by relying on *Mott* v. *Gaer Bros., Inc.*, 22 Conn. Sup. 449, 174 A.2d 549 (1961), for the proposition that a contract of appraisal does not grant the trial court the authority to create an order to proceed with arbitration. In *Covenant Ins. Co.* v. *Banks*, supra, 177 Conn. 279–80, however, our Supreme Court concluded that an appraisal clause in a fire insurance policy, required under General Statutes § 38a-307, constitutes a written agreement to arbitrate within the meaning of §§ 52-410 and 52-411. See also *Giulietti* v. *Connecticut Ins. Placement Facility*, supra, 205 Conn. 432. The defendant's claim, therefore, is without merit.

G

Finally, the defendant argues that because the plaintiff failed to achieve personal service on all defendants, the application was not properly before the trial court. The defendant does not contest that she was personally served. Rather, she asserts that only abode service was achieved on the defendant Edward Clinton.

[8] See footnote 3.

A similar claim was made in *Bridgeport* v. *Debek*, 210 Conn. 175, 554 A.2d 728 (1989), where the defendants asserted that the trial court lacked subject matter jurisdiction to entertain the plaintiff's foreclosure action because the plaintiff failed to serve all the defendants in a timely manner. Our Supreme Court held that "[o]ur precedents make it abundantly clear that, except in the special circumstances of administrative appeals, defects in process do not deprive a court of subject matter jurisdiction." Id., 179. Because the defect in service implicated only the court's in personam jurisdiction, the Supreme Court held that the trial court had jurisdiction to consider the case on its merits as to the defendants who had been properly served. Id., 179–80. Similarly, we conclude that the plaintiff's failure to serve Edward Clinton personally did not deprive the trial court of subject matter jurisdiction in this case. Because the court had subject matter jurisdiction to consider the application to compel appraisal and personal jurisdiction over the defendant, we conclude that this claim must fail.

II

The defendant's second claim is that the trial court improperly granted the plaintiff's application to compel appraisal.[9] She argues (1) that the court failed to consider the rights of the parties, (2) that §§ 52-410 and 52-411 provide statutory relief only for an aggrieved insured, not an insurer, and (3) that the plaintiff presented no evidence of an appraisal agreement or of a dispute as to the value of the loss.

A

Section 52-410 (c) provides that the trial court, after hearing an application for order to proceed with arbitration, "shall either grant the order or deny the appli-

[9] See footnote 4.

cation, according to the rights of the parties."[10] The defendant argues that the trial court failed to consider the rights of the parties before ordering her to proceed with appraisal. Specifically, she asserts that the trial court did not consider (1) her right to have the court not order the appointment of an appraiser, (2) her right pursuant to General Statutes § 52-408 to have the agreement to arbitrate voided as a result of fraud or duress and (3) her right to waive appraisal.

"Arbitration is a creature of contract. . . . It is designed to avoid litigation and secure prompt settlement of disputes and is favored by the law. . . . But a person can be compelled to arbitrate a dispute only if, to the extent that, and in the manner which, he has agreed so to do. . . . No one can be forced to arbitrate a contract dispute who has not previously agreed to do so." (Citations omitted; internal quotation marks omitted.) *A. Dubrueil & Sons, Inc.* v. *Libson*, 215 Conn. 604, 608, 577 A.2d 709 (1990). Accordingly, it seems that the requirement that the trial court must grant or deny an application to compel arbitration "according to the rights of the parties" refers to the arbitrability of the dispute.[11] The question of arbitrability entails both whether the parties have agreed to arbitration and what issues in particular are arbitrable.

"The issue of whether the parties to a contract have agreed to arbitration is controlled by their intention. . . . The intention of the parties is, in turn, a question of fact." (Citations omitted.) *A. Dubrueil &*

[10] See footnote 3.

[11] "The exact meaning of the rights of the parties phrase has rarely been discussed in the reported decisions. The central issue raised by a petition to compel arbitration is whether the reluctant party has agreed to arbitrate the particular question in dispute. Thus, the arbitrability of the dispute, central to General Statutes § 52-409, is undoubtedly what is contemplated by 'the rights of the parties.' " R. Lease, "Judicial Interpretations and Applications of the Connecticut Arbitration Statutes," 7 Conn. L. Rev. 147, 161 (1974).

Sons, Inc. v. *Libson*, supra, 215 Conn. 608–609. Consequently, the finding of the trial court is subject to only limited appellate review to determine whether it is clearly erroneous in light of the evidence in the whole record. Id., 609; *Stelco Industries, Inc.* v. *Bette*, 2 Conn. App. 17, 21, 475 A.2d 1105 (1984).

The defendant first argues that the trial court improperly failed to consider her right to have the court not order the appointment of an appraiser. She asserts that there is no statutory authority for the court to appoint an appraiser. Section 52-411 (b), however, clearly provides that "[i]f no method is provided [in the arbitration agreement], or if a method is provided and any party thereto fails to use the method, or if for any other reason there is a failure in the naming of an arbitrator or arbitrators or an umpire . . . upon application by a party to the arbitration agreement, the superior court . . . shall appoint an arbitrator or arbitrators or an umpire, as the case may require."[12] See also *Covenant Ins. Co.* v. *Banks*, supra, 177 Conn. 278–79. Also, the defendant does not claim nor is there evidence in the record that the appraisal clause in the insurance policy contained an agreement waiving the provision of § 52-411 (b). Therefore, the defendant did not have a right to have the court not appoint an appraiser.

The defendant also contends that the court did not consider her right to have the arbitration agreement voided as a result of fraud or duress. She argues that at the March 7, 1994 show cause hearing, she unsuccessfully attempted to present the trial court with evidence of duress suffered by her as a result of the plaintiff's insistence that she submit to arbitration.[13]

[12] See footnote 3.

[13] While the defendant also mentions fraud as a factor ignored by the trial court in its granting of the application, her appellate brief contains no discussion or supporting allegations of fraud. Accordingly, we decline

Section 52-408 provides that an arbitration agreement "shall be valid, irrevocable and enforceable, except when there exists sufficient cause at law or in equity for the avoidance of written contracts generally." "This means that an arbitration agreement, like any other, can be declared void for fraud, misrepresentation, duress or undue influence, among other reasons not pertinent here. See 6 Williston, Contracts (Rev. Ed.) p. 5369." *Dewart* v. *Northeastern Gas Transmission Co.*, 140 Conn. 446, 449, 101 A.2d 299 (1953).

In this case, however, the defendant does not claim that duress occurred at the time of the formation of the arbitration agreement, that is, at the time when she signed the insurance policy containing the appraisal clause. Consequently, the defendant did not have a right to have the agreement declared void for duress.

Finally, the defendant argues that the trial court failed to consider her right to waive appraisal. She relies on *Batter Building Materials Co.* v. *Kirschner*, 142 Conn. 1, 11, 110 A.2d 464 (1954), for the proposition that "an arbitration clause may be waived by the parties or by the one entitled to its benefit." She asserts that she wants to waive appraisal in order to preserve her right to sue the plaintiff for breach of contract and a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. The plaintiff responds that, under the insurance policy, arbitration is a condition precedent to litigation.

In *Batter Building Materials Co.* v. *Kirschner*, supra, 142 Conn. 1, after the plaintiffs brought an action against the defendants for breach of contract, the defendants moved for a stay until the subject matter of the suit was submitted to arbitration, as provided for in the contract. The trial court granted the stay

to review this claim because it has been inadequately briefed. Practice Book § 4065; *State* v. *Yopp*, 35 Conn. App. 740, 750, 646 A.2d 298 (1994).

after determining that the disputed issue was arbitrable and that the contract provided that arbitration was a condition precedent to litigation. On appeal, the plaintiffs claimed, inter alia, that the defendants had waived their right to insist on arbitration because of an unjustifiable delay between the breach of contract and request for submission to arbitration.

The case at hand is distinguishable from *Batter Building Materials Co.*, where the party wanting to sue claimed that the party wanting to arbitrate had waived its right to rely on the provision that arbitration is a condition precedent to litigation. Here, the party wanting to sue is claiming that she has waived her own right to arbitration, while the party wanting to arbitrate relies on the provision that arbitration is a condition precedent to litigation. For this reason, the defendant's reliance on *Batter Building Materials Co.* is misplaced. Her assertion of a right to waiver amounts to an attempt to escape her prior agreement to submit to arbitration.[14] For the foregoing reasons, we conclude that the trial court did not improperly fail to consider the rights of the parties before ordering the defendant to proceed with appraisal.

B

The defendant next argues that the trial court improperly granted the plaintiff's application because §§ 52-410 and 52-411 provide statutory relief only for an aggrieved insured, not an insurer. In support of this

[14] The defendant also asserts that the court failed to take due consideration of the amount of time that the plaintiff allowed to elapse before requesting the defendant to submit to appraisal. We construe this to be a claim that the plaintiff has waived its right to appraisal because of an unjustifiable delay. A review of the record convinces us that, as in *Batter Building Materials Co.* v. *Kirschner*, supra, 142 Conn. 13, we cannot conclude that, "as a matter of law, the time between the ripening of the dispute and the demand for arbitration was unreasonable and that the [plaintiff] consequently waived [its] right to insist upon arbitration."

position, she cites *Covenant Ins. Co.* v. *Banks*, supra, 177 Conn. 278, in which our Supreme Court noted that "§§ 52-410 and 52-411 . . . provide an appropriate procedure for an insured who needs judicial assistance when an insurer unreasonably refuses to proceed with the appraisal procedure specified in the insurance contract." The defendant asserts that *Covenant Ins. Co.* dictates that §§ 52-410 and 52-411 are "quite clearly a protection for the rights of the insured, but *only* the insured."

We refuse to read either *Covenant Ins. Co.* or §§ 52-410 and 52-411 so narrowly. The Supreme Court's comments in *Covenant Ins. Co.* were appropriate for the facts of the case, where it was the insured who sought appraisal. The reasoning is equally applicable here, where the insurer seeks judicial assistance to compel a reluctant insured to proceed with appraisal.

C

Finally, the defendant claims that the trial court improperly granted the plaintiff's application because the plaintiff presented no evidence of an appraisal agreement or of a dispute as to the value of the loss. As noted previously, because the issue of arbitrability ultimately is a question of fact, our review is limited to a determination of whether the finding of the trial court was clearly erroneous. See *A. Dubrueil & Sons, Inc.* v. *Libson*, supra, 215 Conn. 608–609; *Stelco Industries, Inc.* v. *Bette*, supra, 2 Conn. App. 21.

In its application to compel appraisal, the plaintiff alleged the existence of a contract of insurance, which provided that "if the [defendant] and the [plaintiff] should fail to agree on the amount of the loss, either party may demand that these amounts be determined by appraisal." The plaintiff also alleged that it and the defendant disputed the value of the loss. In her answer and at the show cause hearing, the defendant failed to

deny the existence of the appraisal agreement. The defendant now alleges that the parties actually agreed as to the value of the loss, but the record clearly indicates that the trial court could have reasonably found that a dispute existed. Consequently, we conclude that the court properly determined that an appraisal of the value of the loss was necessary so that the plaintiff could make payment to the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

MECHANICS SAVINGS BANK *v.* TOWNLEY CORPORATION ET AL.
(14333)

O'CONNELL, LANDAU and HEIMAN, Js.

The plaintiff bank sought to foreclose a mortgage on certain real property on which the defendant G held a subsequent lien. G filed an anser, special defenses and counterclaims alleging that the plaintiff had breached agreements with him regarding other property. The trial court granted the plaintiff's motion to strike the counterclaims holding that the agreements relied on by G were separate and distinct from the subject of the complaint and granted the plaintiff's motion to strike the special defenses on the ground that they did not address the making, validity or enforcement of the notes and mortgages that were the subject of the complaint. Thereafter, the trial court rendered judgment in favor of the plaintiff, from which G appealed to this court. *Held:*

1. The defendant's challenge to the trial court's granting of the motion to strike his special defenses was not reviewable; the granting of a motion to strike a special defense is not a final judgment and is therefore not appealable.
2. The trial court did not abuse its discretion in concluding that the subject of G's counterclaims did not arise out of the same transaction as the mortgage being foreclosed.

Argued June 1—decision released August 1, 1995

Action to foreclose a mortgage on certain real property, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, where the

defendant Robert A. Ginsburg filed seven special defenses and seven counterclaims; thereafter, the court, *Freed, J.*, granted the plaintiff's motion to strike the special defenses and the counterclaims; subsequently, the court, *Koletsky, J.*, granted the plaintiff's motion for judgment and rendered judgment for the plaintiff on the counterclaims, from which the defendant Robert A. Ginsburg, appealed to this court. *Affirmed; appeal dismissed in part.*

Mary-Ellen W. Flatow, for the appellant (defendant Robert A. Ginsburg).

Jonathan B. Alter, with whom, on the brief, was *Ann M. Siczewicz*, for the appellee (plaintiff).

O'CONNELL, J. This is a mortgage foreclosure action in which the defendant Robert A. Ginsburg, trustee, appeals from the judgment against him on his stricken counterclaims. He claims that the trial court improperly (1) found that a junior encumbrancer cannot raise a defense or counterclaim that does not relate to the making, validity, or enforcement of the mortgage note, (2) found that there was no legal or equitable basis on which he could raise special defenses and counterclaims, (3) found that he could not invoke the clean hands doctrine in spite of allegations of inequitable conduct by the plaintiff, (4) and failed to consider the allegations of bad faith and inequitable conduct by the plaintiff. We affirm the judgment of the trial court and dismiss the appeal in part.

The plaintiff, Mechanics Savings Bank, brought an action against the defendant Townley Corporation to foreclose a mortgage on a parcel of property located in Hartford. Ginsburg, a junior encumbrancer, was also named as a defendant because he held a subsequent lien on the subject property. Ginsburg filed an answer, special defenses and counterclaims, alleging that the

APPENDIX B

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-95-0156

Middlesex Mutual Assurance Company
v.
Edward Clinton et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant Judith Clinton for certification to appeal from the Appellate Court (38 Conn. App 555 [AC 13428]), it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

Alan M. Gannuscio
ASSISTANT CLERK-APPELLATE

Dated: October 27, 1995
Notice sent: October 30, 1995
Clerk, Superior Court, Middlesex (CV94-0071462S)
Clerk, Appellate Court
Reporter of Judicial Decisions
SAO
Judith Clinton, pro se
Skelley-Rottner, P.C.

Judith Clinton, pro se, in support of petition; Joel J. Rottner and Jonathan Kline in opposition.

APPENDIX C

Amendment IV To The United States Constitution

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV To The United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No. 95-1199

(2)

Supreme Court, U.S.
FILED
FEB 22 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

JUDITH CLINTON,

Petitioner,

vs.

MIDDLESEX MUTUAL ASSURANCE,

Respondent.

On Petition for Writ of Certiorari to the Connecticut Appellate Court

RESPONDENT'S BRIEF IN OPPOSITION

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8 pp

QUESTION PRESENTED RESTATED

"May a court order a unilateral appraisal of the fire damage to an insured's home, against the wishes of the insured, without violating the insured's constitutional rights under the Fourth Amendment, which provides for protection against illegal search and seizure, or the Fourteenth Amendment, which guarantees the insured the right to due process, when the insured has alleged fraud, duress, misrepresentation and bad faith against the insurer regarding the claims handling procedures of the insurer?"

STATEMENT REQUIRED BY RULE 29.6

Respondent, Middlesex Mutual Assurance Company, discloses that it has no parent companies. It has one wholly owned subsidiary, a stock company, Midfield Corporation. It has no other corporate parents, subsidiaries or affiliates.

STATEMENT OF THE CASE

A. Counterstatement

The petitioner, Judith Clinton, seeks review of the Connecticut appellate court decision affirming the lower court order to compel the appraisal of the petitioner's April 23, 1993, fire loss pursuant to the terms of her homeowners insurance policy issued by the respondent, Middlesex Mutual Assurance Company. The petitioner's characterization of the issue as a violation of the petitioner's due process rights under the Fourteenth Amendment, and a violation of their protection against search and seizure under the Fourth Amendment, is raised for the first time in petitioner's writ for certiorari. There is nothing in the lower court's decision on this added question to warrant review and because it was not raised in the lower courts it does not merit consideration by this court.

B. History of the Case

On February 24, 1994, the respondent, Middlesex Mutual Assurance Company brought an action pursuant to Connecticut General Statutes §52-410 and §42-411 against its insureds, Edward and Judith Clinton, requesting the court compel an "appraisal" of a fire loss in accordance with the terms of their homeowners insurance policy, which occurred on the insured's premises on April 21, 1993. On March 8, 1994, the trial court granted the application as to Judith Clinton and ordered her to proceed with the appraisal. Petitioner, Judith Clinton, has at all times opposed said appraisal and has claimed that only the insured but not an insurer can invoke the appraisal provisions of a fire insurance policy. In addition she raised a number of procedural challenges in the court below. The constitutional issues raised by the petitioner in the question presented to this Court were not presented to the trial court.

The petitioner appealed the trial court's order compelling the appraisal in accordance with the terms of the insurance policy. Upon review, the appellate court affirmed the lower court decision holding that the petitioner could not prevail on her claims that: (1) the trial court lacked jurisdiction to order appraisal, (2) the trial court improperly granted the application to compel the appraisal, (3) the trial court failed to consider the rights of the parties, (4) Connecticut General Statutes §§ 52-410 and 52-411 provided statutory relief for only an aggrieved insured, not an insurer, and 5) the respondent had presented no evidence at trial of the appraisal agreement or of a dispute as to the value of the loss. *Middlesex Mutual Assurance Co. v. Clinton,* 38 Conn. App. 555, 556 (1995). The petitioner first raised her Fourth and Fourteenth Amendment claims in her petition for review in the Connecticut Supreme Court. The Connecticut Supreme Court denied discretionary review.

PROCEDURAL REASONS FOR DENYING THE WRIT

The petitioner failed to properly raise the constitutional issues in the lower courts. The petitioner has failed to present any valid reasons for the United States Supreme Court to accept the issue presented which was not previously briefed, argued or decided below. The petitioner for the first time attempts to question the constitutionality of the court's order compelling an appraisal. As a court of review, not one of first view, the United States Supreme Court has refused to consider a petitioner's claim which was not raised in the lower courts. *Oklahoma Tax Commissioner v. Chickasaw Nation,* __U.S.__, 115 S. Ct. 2214, 2219 (1995); *Yee v. City of Escondido, California,* 503 U.S. 519, 532 (1992); *Illinois v. Gates,* 462 U.S. 213, 218-220 (1983).

This case does not present a conflict with the laws of the United States and the State of Connecticut nor with any decisions of this Court.

The jurisdiction of this Court to review cases by way of certiorari was not conferred merely to give the defeated party another hearing. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). No type of case is more appropriately applicable to this reasoning than the case at bar.

In *Yee v. City of Escondido, California*, 503 U.S. 519 (1992), another case in which the petitioners did not raise their constitutional claim until filing a petition for certiorari in the in the California Supreme Court, which denied review, this Court held that, "[i]n reviewing the judgments of the state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider a petitioner's claim that was not raised or addressed below. *Id.* at 532, *citing Illinois v. Gates*, 462 U.S. 213, 218-220 (1983). "As a court of review, not of first view, we will entertain issues withheld until merits briefing, 'only in the most exceptional cases.'" *Oklahoma Tax Commissioner v. Chickasaw Nation*, __U.S.__, 115 S. Ct. 2214, 2219 (1995). (citation omitted). The instant matter fits squarely within this standard as the question presented to this Court for review has never before been presented to any lower court and there are no exceptional circumstances or issues.

SUBSTANTIVE REASONS FOR DENYING THE WRIT

I.

WHETHER A COURT ORDER PURSUANT TO STATE LAW COMPELLING APPRAISAL OF A FIRE LOSS VIOLATES THE FOURTH AMENDMENT PROTECTION AGAINST ILLEGAL SEARCH AND SEIZURE.

Petitioners' invocation of the Fourth Amendment protection to deny the respondent access to her home for the purpose of

appraising the value of the loss is misplaced. The trial court did not ordered access to her premises and accordingly there is no state action. *See Michigan v. Clifford*, 464 U.S. 287 (1983). The trial court simply ordered a private dispute resolution by appraisal. Should the petitioner deny the appraisers and the umpire access to her property, it is unlikely that said appraisers would proceed to trespass upon her property. Indeed, there is no court order compelling access to the property. The petitioner can not be compelled against her wishes to produce her evidence. In such a case the appraisal process will have to proceed without the benefit of an on-site inspection. If that results in an award unfavorable to the petitioner (for example a finding of one dollar in nominal damages based on a lack of evidence) the petitioner will have no one to blame but herself.

II.

WHETHER A COURT ORDER PURSUANT TO STATE LAW COMPELLING APPRAISAL OF A FIRE LOSS VIOLATES THE INSURED'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

Petitioner asserts that a court order compelling appraisal pursuant to the appraisal clause of a voluntarily acquired, statutorily authorized, and valid insurance policy violates her due process rights. A court order compelling appraisal does not amount to a determination liability under the policy. *Hamilton v. Liverpool London & Globe Ins. Co.*, 136 U.S. 242, 254 (1889). It determines the amount in controversy. *Id.* In *Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co.*, 284 U.S. 151 (1931), this Court, in upholding the constitutionality of an appraisal clause in a fire insurance policy, held that the state has the power to prescribe a summary method of ascertaining the amount of loss so far as the substitute remedy is substantial and efficient, and so far as it satisfies the requirements of the Fourteenth Amendment. *Id.* at 159.

Connecticut General Statutes § 38a-307 is the prescribed standard fire insurance policy form for fire policies written in Connecticut. Said form includes an appraisal clause which provides a remedy which is not unreasonable and arbitrary, and which satisfies the constitutional requirements of reasonable notice and opportunity to be heard.

CONCLUSION

For all of the above stated reasons, respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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